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EFFECT OF DECREE IN DIVORCE UPON PERSONAL SERVICE ADJUDGING INTERESTS IN PROPERTY UPON REAL ESTATE IN ANOTHER STATE.

We believe it to be well settled, that, notwithstanding the rule that a judgment or decree in one state cannot affect property, at least directly, in another, yet if there is *in personum* jurisdiction a court of equity may compel a conveyance that will pass the title to real estate in a foreign jurisdiction. Thus in the case of Fall v. Eastin, 30 Sup. Ct. 3, in a divorce case on personal service it was held, that under the faith and credit clause of the constitution a decree therein settling the equities in all of the property of the parties could be enforced so as to make valid a compulsory conveyance to land in another state. See 70 Cent. L. J. 1, where this case is discussed.

The case of Pinkley v. Pinkley, 159 S. W. 795, decided by Kentucky Court of Appeals, may not be in opposition to the above holding, because the decree in another state did not specifically provide for a conveyance. This case goes on the theory that a California court rendering the decree merely acted in accordance with a statute providing for division of property upon a divorce being granted, and such statute can have no extraterritorial operation.

This would not seem to be a good reason for refusing to give faith and credit to the decree abroad, as its basis could not be scrutinized in this way. But, technically, it may be that as a general judgment the decree could have no force abroad directly upon property.

And yet such a judgment is not like an ordinary general judgment, but it apportions property between former husband and wife and according to Fall v. Eastin, if a compulsory conveyance were annexed thereto it would be complete as a conveyance, a constituent of a judgment protected by the faith and credit clause.

The principle is broadly stated in Phelps v. McDonald, 99 U. S. 298, 308, that: "When necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal, for it has the power to compel one to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him."

But suppose a decree at the jurisdiction of the property could be as effectual as a deed voluntarily made, why should it not be without its compelling the formal execution of a deed? We may admit the necessity of compliance with all that is necessary according to the *lex rei sitae*, but it sounds anomalous to say that an act *in terrorem* adds anything of efficacy to a decree, merely because forms in a foreign jurisdiction require certain things.

If this rule were so, obstinacy or personal resolution because of revolt against supposed unjust adjudication, would overturn jurisdiction. Any sort of efficacy in jurisdiction that may depend for its rightfulness, after a party has had his day in court, is raising into respectability the thumb-screw and the rack. Why could a court not require a party to show cause why he should not make a particular conveyance and in default thereof the court direct another to make it? And if it could do this, why should not a decree in equity awarding to a suitor specific property, where there is jurisdiction in personam, have the protection of the faith and credit clause? We do not see why this clause does not run in a broad way, taking no account of mere process, mesne or final, in the enforcement of the rights given by a decree. Once a decree gets under its shelter, it would seem to be there for all that it stands for. Its lien is a matter of local regulation. It may attach or not accordingly. But adjudicating a partition in property would seem to be

another thing, as this might be valid anywhere and everywhere under the faith and credit clause.

NOTES OF IMPORTANT DECISIONS.

MINES AND MINING—SURFACE RIGHTS IN LEASE FOR MINING COAL AND MANUFACTURING COKE.—It appears in the case of Stonegap Colliery Co. v. Kelly & Vickars, 79 S. E. 341, decided by Virginia Supreme Court of Appeals, that a lease of contiguous tracts of land was "for the purpose of mining coal and manufacturing coke thereon and therefrom." One of these tracts lessors insisted should be included in the lease, though it had no mining timber thereon nor coal thereunder. Lessee built houses thereon and rented them to a lumber company until it should need them for its own employees. Lessors sued to enjoin use of the leased premises for any other purpose than that of mining coal and making and selling coke and for an account for such rents. Lessors had decree, and the Supreme Court of Appeals reversed the lower court with directions to dismiss the suit.

The reversing court, looking at other provisions of the lease, holds that the disjointed sentence from which we have quoted did not take this lease out of the rule that "a covenant that premises shall be used by a lessee for a particular specified purpose does not impliedly forbid that they may be used for a similar lawful purpose which is not injurious to the landlord's rights, unless such other use is expressly forbidden," citing therefor Reed v. Lewis, 74 Fed. 433, 39 Am. Rep. 88; San Antonio Brewing Assn. v. Brents, 39 Tex. Civ. App. 43, 88 S. W. 368; 24 Cyc. 1046, 1061.

But in addition to this, the court goes into the history of leases of this kind to repel the implication claimed by lessors to arise out of the words above quoted, the lease being otherwise silent. The opinion says:

"The record shows that the uses to which such premises are necessarily put are so extended as to be difficult of mention in detail. It abundantly appears from the testimony of numerous coal operators, men of wide experience in this and other coal fields in West Virginia and Pennsylvania, that it is usual and customary for the lessee to have the possession, control, and use of the surface of the leased premises, and especially that adjacent to the operation, for all purposes. This is necessary, as shown, for many reasons, both affirmative and negative. It is necessary for coal operators to build numerous tenement houses for their employes, stores, warehouses, office buildings, hospitals, supply houses, hotels and boarding houses, tipples for loading coal, crushing plants, side tracks, tram roads motor roads; to erect tanks, dig wells, lay pipes; to have gardens and pastures both for themselves and employes; and many other rights and privileges depending on local conditions. Control of the surface is necessary to enable the operators to keep off persons engaged in selling whisky, to keep off as far as possible disreputable women and labor agitators. These, among others too numerous to mention in detail, are the purposes to which the coal operator must put the leased premises, and the right to use such premises is necessarily incidental to the lease. Jones on Landlord & Tenant, § 382; Taylor on Landlord & Tenant, § 161; 24 Cyc. 1061."

This recitation includes some things which are important by reason of judicial cognizance anticipating they are likely to occur, e. g. the traffic in whiskey, resort of lewd women and labor agitators, as disturbing elements. These present something in the way of anomaly in surrounding circumstances as an aid to construction of a written instrument. The tract referred to as showing enlargement of surface rights presents legitimate argument, and also the temporary leasing of buildings is correctly ruled not to militate against this enlargement.

THE POWER AND PLACE OF THE JURY UNDER THE RECENT AMENDMENT TO THE OREGON CONSTITUTION AUTHORIZING CHANGE IN VERDICTS.

At the general election held in November, 1910, the people of Oregon by Initiative act amended the constitution of the state so as to provide for an apparently infallible verdict of the jury. The relative places of the judge and the jury in the trial of a cause has been fixed generally by our developed judicial procedure, and this change in the fundamental law of a state supposedly in the interest of a prompt adjudication of cases is startling. The layman has always understood that questions of law were for the judge and questions of fact for the jury, and in the main that is

correct. But ever since the jury took its place in our common law system along about 1200 A. D., the balance of power has been shifting, slowly to be sure, but nevertheless surely sometimes to the judge and again to the jury. For a hundred years or so, however, the jury has had its place fixed in our system of jurisprudence.

A part, at least, of the present popular dissatisfaction with the courts is due to the jury. But so much of the delay in getting a case out of litigation is due to the appeals rather than to the trial, it is natural that the reforms should first look toward the shortening and simplifying of appeals. Nevertheless our jury system needs to be overhauled and modernized, and Oregon has taken the first real step in this direction.

The amendment above referred to, omitting some of the unimportant sections reads as follows:

ARTICLE VII.

Proposed by Initiative petition: Article VII of the constitution of the State of Oregon shall be and the same is hereby amended to read as follows:

Section 1. * * * *.

Section 2. * * * *.

Section 3. In actions at law, where the value in controversy shall exceed $20.00, the right to trial by jury shall be preserved, and no fact once tried by a jury shall be otherwise re-examined in any court in this state, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law upon appeal of any case to the supreme court either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the supreme court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of the opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court; provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court.

Section 4. * * * *.

Section 5. In civil cases three-fourths of the jury may render a verdict. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, and for the sitting of the grand jury during vacation as well as session of the court, as the judge may direct. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form.

Section 6. * * * *.

Section 7. * * * *.

A part of the third section provides for the final disposal of matters on appeal and a good many cases will arise where the jury's findings will not be under consideration. This discretionary power given the higher court may, however, have a bearing on the verdict, and as it does it will be considered herein, but other than in that connection, it will be ignored, as the limits of one article forbid the discussion of the whole amendment.

Notice particularly the provision requiring only three-fourths of the twelve jurors to concur, in order to bring in a verdict in a civil case. This is one of the recent changes made in several states relative to the jury and in this Oregon is not a pioneer. This change does not affect the power of the jury, for it still has the same duties to

perform; the only difference is that the verdict of three-fourths is considered the verdict of all. This provision standing alone would be an admirable advance along reform lines, as it does away with the possibility of one or two jurors holding up a verdict through sheer obstinacy or because their view failed to coincide with the three-fourths majority. But this reform working in conjunction with that part of the amendment providing that no issue of fact, once tried by a jury should otherwise be re-examined by any court in the state unless it could affirmatively be said that there was no evidence to support the verdict, may go too far and cause unjust results. With that much greater ease will a verdict be rendered which once made up is meant to be final and absolute. The provision with reference to the effect to be given the jury's verdict is clear and unequivocal. There is no possibility of the court construing it liberally by qualifying terms, as there is no doubt of the meaning and intent of those words. It puts the matter up to the appellate court to state in its findings on appeal that there is no evidence to support the verdict before they can reverse on that ground. It does not seem that the court can qualify that phrase by saying that there was meant substantial evidence or any other than proper evidence, for if that construction is placed on that part of the amendment it would render it of no effect. The court before the amendment passed, could reverse if the verdict did not have substantial evidence back of it. The only time, in construing the amendment that the court uses a modifying term for the word evidence, which could have a bearing on the weight or sufficiency thereof was in the case of Devroe versus Portland Ry. Light & Power Co.[1] (Or.) later cited, and in this case it was evidently drawn inadvertently into error.

The practical effect of this change in the fundamental law of a state should engage our attention as on the face of it, it is a step forward in a field where reform is needed. As stated above, the provision with reference to three-fourths of the jury concurring, a verdict could be made up, standing by itself is an admirable movement forward, as it does away with the large number of mistrials due to a failure to agree on a verdict. But in connection with the aforementioned provision, it magnifies still more the power and place of the jury. If the verdict of the jury is to stand unquestioned then is it wise to permit anything less than an unanimous verdict? We can ignore the cases where there would be no evidence to support the verdict as no case will ever be submitted to the supreme court of Oregon or any other state which will not have some evidence no matter how weak and unconvincing to the court to support it not as a reasonable finding, but merely based on any evidence. A reasonable finding is not required; it is enough if there is a verdict supported by some evidence. The higher court is forced to ignore all the evidence to the contrary, no matter how weighty and must ask itself the single question, is there any evidence to support the verdict.

To determine the real effects of the change wrought in the matter of making the verdict of the jury unchangeable, consider briefly the history of the jury.

The primitive jury practically tried both questions of law and fact and left few prerogatives to the trial judge. Furthermore, questions of facts coming to the jury arbitrament were decided on the knowledge of the members of the jury whether acquired outside the case or from the evidence produced at the trial and thus one of the main rights of the appeal court at a later time, that of re-examining the verdict was impossible under such practice. The jurors were allowed to base their verdict entirely on this extra forensic knowledge if they saw fit, so the court could not look into the verdict to ascertain whether there was sufficient evidence to support it, for there was no way to discover how far

(1) 131 Pac. Rep. 304 at 307.

this outside knowledge affected the verdict. The jury was no more, no less, than a board of arbitration with the trial judge sitting as a presiding chairman with no power to speak of.

Such a condition was not consonant with right and justice. It is one of the principles of the common law that fair trials should be had, and it is clear that there could not be a just disposition of a case with jurors not under oath to tell the truth giving evidence to their fellows on the jury, rumors and counter-rumors picked up outside and no opportunity for a proper cross-examination by the adverse party. The only possible time a just and equitable result would be brought about, not considering the times when verdicts by chance happened to be right, would be when each litigant would have a partisan on the jury to minimize as much as possible the unfavorable testimony. But such instances were rare as no partisan was supposed to be on the jury. It is easily understood that the law of chance would be kinder than such a jury to the one who had the right on his side, for when he had once submitted his case, he was bound by the result reached. and there was no court to set aside the unjust findings. And, therefore, it was not long before the jury was limited in its deliberations to the evidence produced in court under the watchful eye of the court and the adverse cross-examiner.

The practice of submitting only questions of fact to the jury and leaving the determination of matters of law to the court became firmly established when it was realized that the jury was not expert enough to pass on the law. Having been cut down to this point, the power and importance of the jury was still to be further curtailed in the interests of justice by the trial judge assuming the right to set aside verdicts considered by him to be against the weight of the evidence produced at the trial. This last change is comparatively recent. Several decisions in the early American reports hold that the trial judge only had the right to declare the law to the jury, and the determination of the facts without interference by the court was to be left with the jury.

The separation of questions of law and fact and the limiting of the facts to be considered to those produced at the trial naturally gave to the judge an incidental control over the jury inasmuch as he decided what evidence should go in. In the exercise of this power the judge, of course, limited the evidence offered to matters pertinent to the issues, and thus all outside knowledge was barred, for the court also instructed the jury to bring in its verdict from the evidence admitted at the trial and from that alone. Add to this incidental control the power to direct and set aside verdicts after they were rendered, and to grant new trials and the court becomes apparently the dominant factor in a trial.

Theoretically, when this point was reached our system of conducting trial was ideal, but practically it was far from it. It is true that the jury can be effectually prevented from considering questions of law, as such matters are assiduously kept away from them, and where questions of law and fact are mixed the judge can easily hold the jury to its own functions. But have we prevented juries from deciding points on their extra forensic knowledge, by merely having the court instruct them to consider only the evidence presented in the case at hand? We all know that a juror will not be excused from serving merely because he has a knowledge of the case. He takes an oath that he will try the case according to the evidence presented at the trial and the law as given him by the court, but he forgets all that, which is not to be wondered at, as he is in a strange place usually, and he answers yes to the oath read to him because it seems a mere formality to him, and because he is expected to so answer. But after the case is submitted and he is shut up with the other jurors to deliberate, he loses sight of the difference between what he has seen and heard outside the case, and what comes into the case

guarded by the oath of the witness and the cross-examination of the adverse attorney. Instead of keeping his outside knowledge to himself, he tells his fellow jurors, and it has its effect on every one of the twelve men. However, as long as we have this institution to settle our disputes, we will have to put up with these difficulties and strive to raise the standard of the individual juror.

The judge's power to direct a verdict is clearly recognized in the law to-day, but there is much difference of opinion found in the court decisions as to what the exact limits of that power shall be. There is no question but that, if there is competent evidence on a material issue only on one side, a verdict should be directed that way as no other verdict could stand, and it would be useless and unnecessary to leave the matter to the jury. There are courts holding to the rule that if there is "a scintilla of evidence," the party producing it has the right to have his case submitted to the jury and this irrespective of the fact that the same courts would set the verdict aside and grant a new trial if the jury based its verdict on the scintilla of evidence and disregarded more weighty evidence. The better procedure is to direct a verdict, if one rendered the other way by the jury would be set aside as against the weight of the evidence, and this is the rule of most courts. Whether the evidence was sufficient to warrant a verdict is a question raised on motions for a directed verdict in the same way as on motions to set aside the verdict and grant a new trial. Although the questions presented to the court are the same in both instances, in directing a verdict he disposes of the issue as far as his court is concerned, whereas in setting aside a verdict he cannot determine the issue himself, but must order a new trial. The relief given in the latter instance is not as hard on the opponent as in the former, and for that reason the judge is tempted to deny the motion to direct the verdict as he knows that he can later set the verdict aside, and he can take a chance that the jury will go right somehow.

The law of Oregon is in line with that in the majority of the other states for its Supreme Court has decided[2] that the test to be applied in determining when to direct a verdict is whether a different verdict in the absence of special instructions would need to be set aside as contrary to the weight of the evidence, if rendered by a jury. This close identity of the issues raised on a motion for a directed verdict with the questions brought up on a motion for a new trial has an important bearing on the scope of the Oregon amendment. According to the terms of the new law no fact once tried by a jury can otherwise be re-examined by any court in the state unless it could affirmatively be said by the court having the matter under consideration that there was no evidence to support the verdict. This practically cuts off the right of the court to set aside verdicts and grant new trials on the ground that the verdict is against the weight of the evidence.

But the decision last cited was rendered at a time when the right of the trial court to set aside a verdict against the weight of the evidence was unquestioned. Such a test cannot be applied under the new practice, as there is no power to set aside a verdict on that ground. Inasmuch, however, as the amendment does not expressly curtail the court's power to direct a verdict with the preponderance of the evidence, the test will probably be whether a different verdict would be against the weight of the evidence, and not whether a verdict the other way would be set aside as against the weight of the evidence.

If the court's decision on motion to direct a verdict is adverse an appeal to the Supreme Court will bring up the same matter for adjudication that the denying of a motion to set the verdict aside as against the weight of the evidence, did under the old practice. And if the litigants take advantage of that right they are practically

(2) Coffin v. Hutchinson, 22 Ore. 554.

in as good a position as before the amendment passed. But this motion for an instructed verdict becomes of more importance as the court has no later opportunity to correct a wrong decision, as he formerly had.

Irrespective, however, of the test fixed by the courts, most trial judges are in the habit of refusing to direct a verdict except when it appears beyond a shadow of a doubt what the verdict should be. The reason for this is that the motion seems unnecessary and the chances of going wrong is great. The motion is made during the progress of a trial and while the jury is sitting on the case. The court has time to consider only his own recollections of what the evidence is, and he is not justified in deliberating very long on the question for by so doing he would be holding the jury at a high cost to the county. On the other hand when the motion to set aside the verdict comes the jury has been discharged and the judge has the reporter's notes before him and he has the time to make an exhaustive study of the evidence. An error in refusing to direct a verdict can, in a measure, where it is possible as under the former Oregon practice, be corrected by setting aside the verdict and granting a new trial. The failure to direct a verdict in a proper case could only be adequately remedied at a later time and after an adverse verdict rendered, by giving judgment *non obstante veredicto*. But this is never done except on objections to the pleadings and has no reference to the sufficiency or insufficiency of the evidence to support the verdict. Under the former practice in Oregon as well as in most other jurisdictions where there was a conflict in the evidence produced at the trial, the trial judge generally refused to direct a verdict knowing that after the jury had determined the issues. an erroneous verdict could be corrected by granting a new trial.

Outside of the provision for verdicts of less than an unanimous jury, the only changes that appear reasonably on the face of the amendment are with reference to giving the verdict of the jury an irrevocable effect and giving the Supreme Court the power to ignore the errors of law and to enter up judgment if they can determine from the whole record and testimony what judgment should be given. If the Supreme Court had been given this power without prohibiting it from reviewing the verdict of the jury, it would have been in a better position to do that justice contemplated by the amendment, and for this reason the refusal to grant a new trial where the verdict was against the great weight of the evidence was under the old practice an error of law, and under the new procedure it could have been ignored by the Supreme Court if in the interest of justice were it not for the provision of the amendment giving finality to such a verdict assuming that it was supported by some evidence. But such a ruling cannot be error, as no court has jurisdiction to consider whether the verdict is against the weight of the evidence and thus the higher court is cut off from correcting an unjust verdict supported by some evidence but still against the preponderance of the evidence. If the trial court says affirmatively there is no evidence to support the verdict and then refuses to grant a new trial this will be an error of law, of course. But as to whether it will be sufficient to reverse on that ground depends upon whether the supreme court agrees with the trial court that there is no evidence to support the verdict, and if it does agree, it seems obligated to reverse, as this is an error of law that cannot be ignored in determining from the record and evidence whether it can enter the proper judgment. If there is no evidence to support the verdict and the court affirmatively finds so, then there must be a reversal and if the court enters up a different judgment, it is giving effect to the error of the trial court in refusing to set aside the jury's finding and grant a new trial.

On the other hand, it seems without doubt that unless the trial judge or supreme court does affirmatively say that there is no evidence to support the verdict, they are

effectively inhibited from disturbing the verdict. The verdict of the jury then will evidently stand as the last word in a disputed question of fact unless this affirmative finding is actually made by the court.

But what kind of a verdict and what kind of a jury is given this unquestioned power? Surely, not every jury impanelled and sitting on a case and bringing in a verdict is clothed with this power by the amendment. And, furthermore, does the amendment preclude the trial court from invading the province of the jury before the case goes to them? These are important considerations. It has been assumed above that the court can, and does, direct a verdict when there is no evidence to support the verdict the other way. It is clear that this power of the court is not interfered with by the amendment, for, manifestly, if a court believes before the case goes to the jury, and affirmatively says that there is no evidence to support the verdict he is not obliged to wait until the jury finds a verdict supported by no evidence before he can set it aside. The troublesome question is whether the amendment precludes a judge from directing a verdict unless he does affirmatively say in the words of the changed law, there is no evidence to support the verdict. To put it more concisely, is the trial judge to still have all the power he had under the former Oregon practice to direct verdicts in the direction of the great preponderance of the evidence in the case.

If the power to direct verdicts is not to be modified, it will not be necessary to insist that the jury's connection with the trials be regular to the last technical requirement. But if a litigant is to be forced to submit his case to a jury in matters where jury trials are guaranteed irrespective of the amount of the evidence brought into the case by his opponent, it becomes of the utmost importance that every step in reaching the verdict should be rigorously correct.

After speculating thus far on the probable limits of the amendment in its every phase. we are face to face with the proposition that it is not the opinion of a layman, nor even of a practicing attorney, but rather the decisions of the court that will furnish the basis for determining its real meaning and extent. The matter of interpreting the amendment has been before the court many times, and although the change is of comparatively recent date, all of its general features have been in the main squarely construed.

The court decided in line with the evident intent of the new law that the findings of fact where the case was tried by the court without a jury stand the same as a jury's verdict and cannot be re-examined except as a verdict may be.[3]

It is admitted without question, that not every decision of a body sitting as a jury is to be given absolute effect. "An invulnerable verdict must be a conclusion of fact by a jury regularly impanelled, as the result of a trial in which the rights of all parties in respect to the admission or exclusion of testimony have been observed in all material particulars under proper instructions of the court as to the law."[4] This states the law as it will stand, but certain portions thereof need exemplification. The court has held at different times[5] that the evidence submitted to the jury must be legal evidence, and this means evidence permitted by rules of law. In other cases the required evidence on which to base the verdict is spoken of as competent evidence[6] which is not quite as comprehensive a term as legal evidence. In still other opinions, the court states that the jury must be properly instructed in order to give to the verdict a final quality.[7] But not in any decision does the court intimate that it has the

(3) Lewis v. Northwestern Warehouse Co. (Ore.) 127 Pac. 33; Richardson v. Investment Co., (Ore.) 133 Pac. 773 at 774.

(4) Forrest v. Portland Ry., Light & Power Co., (Ore.) 129 Pac. 1048, 1051.

(5) State v. Rader, (Ore.) 124 Pac. 195 at 196; Sullivan v. Wakefield, (Ore.) 133 Pac. 641 at 643.

(6) Caraduc v. Schanen-Blair Co., (Ore.) 133 Pac. 636 at 638.

(7) State v. Rader, supra; Love v. Chambers Lumber Co., (Ore.) 129 Pac. 492 at 494.

right to judge as to the weight of the evidence, except in one instance,[8] where it uses the term substantial evidence as being sufficient to support a verdict. It is also held that the admission of proper and the exclusion of improper evidence is necessary in order that the jury may render a verdict that will stand under the fundamental law as changed.[9] The way the court approaches the question on appeal is shown in one case[10] where the court uses the following language: "If we can point out any evidence in the record which the jury was authorized to consider as proving . . . we must affirm the decision."

Collecting all these decisions, it appears therefrom that the verdict which cannot be set aside under the altered fundamental law is one made up by a jury regularly impanelled, permitted to consider all legal, competent material and relevant evidence which is offered to be admitted by the litigants and prevented from considering all erroneous and improper evidence offered, and with proper instructions from the court as to the legal effect of the evidence. The language of the court in the case above cited that where there is substantial evidence, the verdict is unassailable is not exactly true, as the evidence does not have to be substantial, by the holding, impliedly at least, in the other cases.

The term evidence is modified still further in the courts' decisions by the phrase, "sufficient to go to the jury."[11] Sufficient to go to the jury might mean sufficient for the jury to find a verdict in accordance with the preponderance of the evidence or sufficient to find a verdict based on some evidence. Unless, however, the court has fallen into error in the use of words it can scarcely mean the latter. The word "sufficient" connotes a weighing or estimating of the evidence. If the verdict need only to be supported by "any evidence in the record which the jury was authorized to consider" as stated in Studbrud v. Frasier, supra, then the words "sufficient to go to the jury" are superfluous. It is more reasonable to think that the court used those words deliberately, intending that no case should be left to the jury which did not have sufficient evidence on either side to justify a verdict. The court formerly, before it was prohibited from interfering with a verdict, always supervised the findings of the jury and considered whether they were sufficiently supported by competent evidence, and whether before the case went to the jury the evidence was sufficient either way to support a verdict the jury might bring in if the case were left to them. In the many cases construing the amendment since it was passed not a single one points toward a possible construction that the verdict of the jury must be supported by sufficient evidence to stand. But rather, the court says emphatically that it is only necessary to be supported by some evidence which means any. Evidence sufficient to support the jury then is no longer necessary, but evidence sufficient to go to the jury seems as necessary as ever.

Although the Supreme Court has not as yet reversed the trial court in refusing to direct a verdict, still it is intimated that it would in a proper case. In the case of Hahn v. Mackay,[12] the court held that it was necessary to take up the whole transcript of the testimony, except in the two cases of errors of law in the refusal to grant a non-suit and refusal to direct a verdict. The court was considering only errors of law and the amount of testimony necessary to have, to pass upon the errors. If there was no difference made between the issues raised on these questions and on the refusal to direct a new trial, the court would naturally have included the latter as

(8) Devroe v. Portland Ry., Light & Power Co., (Ore.) 131 Pac. 304 at 307.

(9) State v. Rader, supra; Lewis v. Northwestern Warehouse Co., (Ore.) 127 Pac. 33 at 35.

(10) Studbrud v. Frasier, (Ore.) 124 Pac. 657 at 659.

(11) State v. Hill, (Ore.) 128 Pac. 444 at 446; Gleason v. Demson, (Ore.) 132 Pac. 531 at 532; Foster v. University Lumber & Shingle Co., (Ore.) 131 Pac. 736 at 741; Devroe v. Portland Ry., Light & Power Co., supra; Purdy v. Vankueren, (Ore.) 119 Pac. 149 at 150.

(12) 126 Pac. 12 at 14.

an error of law requiring the whole transcript of testimony, or rather would have recognized that if the refusal to grant a new trial was not an error of law unless there was finding that there was some evidence to support the verdict, it would be no more an error to refuse to direct a verdict unless there was similar finding that there was no evidence to support the verdict. And these errors being the same in effect, the only evidence necessary to take to the Supreme Court would be the smallest possible legal evidence, for that would be all that the court would need to determine whether there actually had been error. In Caraduc v. Schanen-Blair Co. supra, the court holds that there was no error in submitting the case to the jury, after observing that the jury could reasonably find negligence. This language indicates that the court believes that if there is evidence from which the jury can reasonably find, the case must be submitted to them, whereas, if the amendment controlled the trial judge in this respect, and required him never to take a case from the jury except when there was no evidence to support the possible verdict it would not take evidence sufficient for a reasonable verdict to give the jury the case. The court in State v. Michellod[13] uses the following words: "No application was made for a directed verdict of not guilty; and the defendants having relied on a finding of an acquittal, thereby waived most every other question that could otherwise arise." The intimation is therein found that if the defendants had made this motion for a directed verdict, the court, in considering that motion on appeal would not have been so helpless, for it later on says: "We think it cannot be said there was no competent evidence tending to support the verdict." But in Wills v. George Palmer Lumber Co.,[14] which is one of the earliest cases construing the amendment, the court says: "We cannot affirmatively say there is no evidence to support the verdict, and based on this conclusion, the action of the court in denying a motion for a judgment of non-suit and in refusing to direct a verdict for the defendant will not be reviewed." The court apparently is here applying the provisions of the changed law to motions for non-suit and directed verdict, but a closer examination of the case shows that the court was entering up its judgment, adopting the judgment arrived at in the lower court, and in using words cited only meant that any error in refusing to grant the motions would be disregarded.

(13) 124 Pac. 263 at 264.
(14) 115 Pac. 417 at 418.

The conclusion to be drawn from the above cases is that the fundamental law of the state has been changed only so far as it respects the jury, to make a verdict once properly found invulnerable. And even if there are errors of law, which would set aside the verdict, a reversal is not always had, for the court is given the right to ignore the errors and enter up a verdict and judgment when it considers that it can with a fair degree of justice.

The right in the court to set aside the verdict when it is incumbent upon it to do so and enter up its own verdict when the testimony and record is so complete and the case is in a condition where it can be done without injustice, shows that the jury is not made so absolute after all. It is only when it brings in an unassailable verdict that the jury stands pre-eminent. If for any reasons there are errors of law connected with the trial in the matter of submitting the evidence to the jury, and there are no other errors of law of any moment at the trial, then the case is reopened. The verdict is not re-examined; there is no weighing of the evidence, still it is given no effect by the court, for whether the court enters up a different verdict, or adopts the one entered by the jury, it is the court's verdict. It is the result of the quasi-equitable retrial, as stated in one opinion of the court. If the court considers the assignment of error well taken, it then surveys the whole scope of the case, and comes to a conclusion as to what the verdict and judgment should be. If this corresponds with what actually has been entered up, it then ignores the errors of law and affirms the verdict and judgment, and if not, then it enters up a different verdict and judgment. In both cases, however, it is the court's verdict and judgment.

The change wrought by the amendment is supposed to be in the interest of preventing long and expensive litigation. And the object is right, and the change will be a wise one, if it does not serve to fix an unjust verdict as the final one. But the right to supervise the verdict evidently still

lies with the court in the unaltered right to take the case from the jury and to direct a verdict, and this will save the rights of the unsuccessful litigant.

The trial court is placed under a greater obligation than it has assumed heretofore, to consider motions to grant non-suits and direct verdicts on their merits. It is the trial judge's last chance to weigh the evidence and a mistake here will be fatal, for the higher courts will hold up the verdict and judgment for such errors, although the result may not be changed when the final verdict and judgment are entered up, for the Supreme Court may ignore the errors and adopt the verdict and judgment found in the lower court. The result of asking for an instructed verdict is that the litigant puts himself in a position where he may escape the consequences of a verdict against all principles of right and justice. If the court denies the motion in a case where the evidence strongly predominates in favor of the movement and a verdict in his favor does not cure the error, he is in a position to call the attention of the Supreme Court to the error and profit by it. Alertness at the trial will thus save the litigant from a hard position caused by an unassailable verdict, clearly against the great weight of the evidence but still supported by some evidence.

Outside of this one hard position in which a litigant may find himself by virtue of the amendment, the change in the law will have beneficial results. It will result in most cases in only one trial in the lower court and only one appeal to the Supreme Court. Ignoring rules of law giving effect to technical errors best honored in the breach than in the observance, will make for greater freedom in the Supreme Court. And if this radical change will relieve from the wearying tediousness of the long drawn out processes of the law without sacrificing any rights, then it will be assured a place in the procedure of every state. It will be just as well, however, not to extend the reform to other states until it has had a severer test in Oregon, but if its meaning is limited to the clear intent of the words and it is not extended further, it will hardly result in giving tyrannous powers to the jury. Assure ourselves of that and the most radical change in the jury system in a hundred years in the United States will stand as a salutary reform.

WM. ARTHUR TERRALL.

Aberdeen, S. Dakota.

HOMICIDE—ASSAULT WITH INTENT TO MURDER.

LEARY v. STATE. (No. 5,077.)

(Court of Appeals of Georgia. Oct. 21, 1913.)

79 S. E. 584.

The act of maliciously putting broken glass into food with intent that the food shall be eaten by another, and that he shall in this manner be killed, does not, without more, constitute the offense of assault with intent to murder, when he does not eat the food after the glass has been put into it.

POTTLE, J. The plaintiff in error was arraigned under an indictment charging him with the offense of assault with intent to murder. Omitting the formal parts, the indictment charged that Jule Leary "unlawfully, feloniously, and with malice aforethought did put broken glass into the collard greens and corn bread of Lucius Zeigler, the said broken glass being a weapon likely to produce death, and the said broken glass being then and there deposited in said collard greens and corn bread with the intent then and there to cause the said Lucius Zeigler to eat the same, and the said acts in and upon the said Jule Leary did thereby make an assault with the the said Lucius Zeigler to kill and murder, and the said Jule Leary with said broken glass which he then and there deposited as aforesaid did unlawfully, feloniously, and with malice aforthought attempt to kill the said Lucius Zeigler, contrary to the laws of said state, the good order, peace, and dignity thereof." The accused demurred on the ground that the facts set forth in the indictment did not constitute the offense of assault with intent to murder, that the indictment failed to charge any overt act indicating that the accused procured and induced the prosecutor to swallow or otherwise use the broken glass, and because the indictment failed to charge how or in what manner said broken glass was deposited, or in what manner the same was placed before, or whether it was offered or administered to the intended victim at all. The demurrer was overruled, and the accused was convicted. Within 20 days from the overruling of the demurrer he sued out a writ of error to the Court of Appeals, complaining of the judgment overruling the demurrer, but did not assign error upon any other judgment rendered in the case. In this court a motion was made by the solicitor general to dismiss the writ of error, upon the ground that the accused could not assign error upon the judg-

ment overruling his demurrer without also excepting to the final judgment of conviction.

(2) 1. There is no merit in the motion to dismiss the writ of error. A bill of exceptions may be sued out to this court, complaining either of a final judgment or of one which would have been final if it had been rendered as claimed by the excepting party. Civil Code, § 6138. If the demurrer had been sustained, the indictment would have been quashed, and this would have been an end of the case.

(3) The fact that the accused was convicted and sentence imposed before he excepted to the judgment overruling the demurrer is immaterial. It was not necessary that he should file a motion for a new trial, or that he should except to the final judgment of conviction. Doubtless, if the demurrer was not well taken, the accused was properly convicted, and has no just cause of complaint. It would be useless to require him to file a motion for a new trial when no errors of law were committed during the progress of the trial, or to interpose a formal exception to the final judgment of conviction. It is settled by a number of decisions of the supreme court that this was not necessary. "A writ of error lies to a judgment overruling a demurrer to the whole bill, notwithstanding the complainants may have proceeded to a hearing and obtained a decree, and though the decree be not excepted to, nor any motion made for a new trial." Lowe v. Burke, 79 Ga. 164, 3 S. E. 449. See, also, Kitchens v. State, 80 Ga. 810, 7 S. E. 209; Central Railroad Co. v. Denson, 83 Ga. 266, 9 S. E. 788; City of Augusta v. Lombard, 86 Ga. 165, 12 S. E. 212; Turner v. Camp, 110 Ga. 631, 36 S. E. 76.

(4) Where an exception is made to an interlocutory ruling which is neither final nor would have been final if it had been rendered as claimed by the excepting party, it is necessary to except to the final judgment in the case before a reviewing court will acquire jurisdiction to pass upon the interlocutory ruling. Lyndon v. Georgia Railway & Electric Co., 129 Ga. 353, 58 S. E. 1047; Carpenter v. First Nat. Bank of Sandersville, 13 Ga. App. —, 79 S. E. 360, and cases cited. In these cases the question raised by the exception was not one which would have finally ended the case no matter which way decided. If the ruling made was a final termination of the case, or would have been so if rendered as claimed by the excepting party, then this court has jurisdiction to pass upon the exception of the ruling, although no other judgment is excepted to.

(1) 2. In Johnson v. State, 92 Ga. 36, 17 S. E. 947, the indictment charged the accused with having committed the offense of assault with intent to murder by putting arsenic and other poison into coffee, "and administering the said poisons" to the person named in the indictment. The proof showed that the person thus named drank of the coffee containing the poisons; it was held that the indictment sufficiently charged the offense of assault with intent to murder, and that under the evidence the accused was properly convicted. This decision was based upon the English case of Reg. v. Button, 8 C. & P. 660. In Peebles v. State, 101 Ga. 585, 28 S. E. 920, it was held: "The act of maliciously putting poison into a well with the intent that the water thereof shall be drunk by another, and that he shall in this manner be killed, does not, without more, constitute the offense of an assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same." The case of Johnson v. State, supra, however, was distinguished from the case then under consideration by reason of the fact that in the Johnson case the intended victim actually drank of the coffee. In the opinion the court said: "We think the Johnson case and the English case of Reg. v. Button, 8 C. & P. 660, cited in support of it, go to the full extent authorized in holding that an assault has been committed in cases of this character. The case in hand closely resembles one where a pitfall has been dug, or a spring gun set or a gun loaded with the felonious intent of depriving another of his life, but where the criminal intent did not proceed sufficiently far to bring the individual whose death was meditated into immediate and present danger." See, also, Groves v. State, 116 Ga. 516, 42 S. E. 59 L. R. A. 598; Chelsey v. State, 121 Ga. 340, 49 S. E. 258. The indictment in the present case does not allege either that the intended victim partook of the food containing the bits of glass, or that the accused administered glass to the victim with intent to kill him. The effect of the ruling in the Johnson Case, as explained and restricted by the decision in the Peebles Case, is that in cases of this character there can be no assault unless the poison is administered to the victim, and there can be no administration of it unless the victim partakes of the substance containing the poison. The present indictment charges merely that the accused put broken glass into the intended victim's food with intent that he should eat it, and did

thereby make an assault with intent to kill. There is no averment that the broken glass was administered to the intended victim, or that he partook of any of the food in which the glass was contained. This being so, the indictment did not set forth the offense of assault with intent to murder, and the demurrer thereto should have been sustained.

Judgment reversed.

NOTE.—*Attempts to Commit Crime.*—The instant case goes on the theory, that the attempt should have partially accomplished its purpose, the deadly mixture have been taken or tasted. That, however, seems not to be the test, but the question rather is whether an attempt has a reasonable proximateness to the purpose aimed at, a more philosophical and satisfactory reasoning than the instant case employs. The cases we submit are distinguished on this idea. In Pallis v. State, 123 Ala. 12, 26 So. 106, 82 Am. St. Rep. 106, it is said it seems to be well settled that where a parent, having charge of an infant of tender years, abandons and exposes it to the inclemency of the weather, such parent is guilty of an assault. If physical detriment ensue from such weather, it is a battery on the child. Russell on Crimes, Sec. 1022, p. 1021; 2 Bish. New Cr. Law, Secs. 29, 33, 72, 660. Here it is seen that the mere fact of abandoning a child and thereby exposing it to danger of death is an assault. To open a window and let in cold in such a way as, and with the intent, to cause death, is an assault. This would be on the theory of setting a cause in motion to bring on death in the ordinary course of events. Is this distinguishable from placing poison where it is likely to do the same thing?

In an explosion case a package was sent by mail with the intent that a particular person would open it and be killed. She did partially open it and there was a slight explosion doing no damage. An officer was called and the package being fully opened by means of a string, there was an explosion of terrific force. The opinion considers the question along the line of defendant doing acts "intended, adapted, approximating and such as, in the ordinary and likely course of things, would result in the commission of the particular crime," no stress whatever being laid upon the fact that there was a partial explosion. The court said: "If the defendant sent the box, expecting, and therefore, intending that such box would be received and opened by her, and that, as a result of such opening, a death-dealing explosion was likely to follow, he cannot escape conviction. . . . Was the defendant inspired by criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent?" The instructions are not shown, and it may be that this case does not exclude the idea, that had there been no attempt to open the box and no partial explosion, there would have been no assault, but the reasoning is upon the theory that the sending constituted the assault.

In 17 Cent. L. J. 26, there is a very excellent discussion, reproduced from Irish Law Times, under the title "Criminal Attempts" from which we make a few extracts. Under the sub-title "Preparations" it is said: "To make an attempt penal, it must be such a movement, directed towards the consummation of a crime, as would apparently end, if not extraneously interrupted. in such consummation. . . . An assault, it has been repeatedly ruled, when apparently fitted to do harm, if pressed to a battery, does not cease to be indictable, because it turns out that no battery could have been effected." There is given an illustration of an assault as follows: "A intends to assassinate B and lurks in a street, through which B's carriage is to pass, and then shoots at the carriage at a time when he thinks B is in it."

In Russell on Crimes (9th Ed.), p. 145, it was said to have been held that handing poison to A and endeavoring to get A to administer it to B was an attempt to commit a crime, citing R. v. Williams, 1 Den. 39. But procuring dies for the purpose of counterfeiting coin was held not an attempt because the act was not sufficiently proximate to the complete offense. R. v. Roberts, Dears. 539, 25 L. J. M. C. 17. These and other like things were held misdemeanors only

In People v. Lawton, 56 Barb. (N. Y.) 126, it was held that where one went to a house with a set of burglar tools and was caught in the act of entering a shop to get a crow-bar to be used in breaking into the house, he was guilty of an attempt, the act not being too remote. So also it was held that preparing combustibles, placing them in a room and soliciting another to use them was an attempt. McDermott v. People, 5 Park. Cr. Rep. (N. Y.) 102. But the mere delivery of poison to another requesting him to put it in a spring, is lacking in overt act sufficient to constitute attempt. Stabler v. Com., 95 Pac. St. 318, 40 Am. Rep. 653. So also is deemed no more than preparation to procure poison and soliciting another to administer it. Hicks v. Com., 86 Va. 226, 19 Am. St. Rep. 891. On the contrary it was ruled that where one handed matches to another and offered to pay him to burn another's house, this constituted an attempt. State v. Bowers, 35 S. C. 262; People v. Bush, 4 Hill (N. Y.) 133. Various instances, some held attempts because sufficiently proximate, and others not because preparation merely, are given in 3 Am. & Eng. Encyc. Law 265, *et seq.*

C.

HUMOR OF THE LAW.

"The young fellow who's coming to see you, Elsie, must be a lawyer."

"What makes you think that, father?"

"Because I notice whenever he comes to court he always pleads for a stay."—Baltimore American.

Judge—What is your name?

Swede—Yon Yonson.

Judge—Are you married?

Swede—Yah.

Judge—Whom did you marry?

Swede—I married a woman.

Judge (with indignation)—Did you ever hear of anybody marrying anybody else but a woman?

Swede—Yah. My sister, she married a man.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments**—Personal Services.—Where the contract between a creamery company and a person who had formerly operated a cream route was for personal services rather than the sale of cream, it was nonassignable.—Walton v. Davis, Cal., 134 Pac. 795.

2. **Attorney and Client**—Fees.—Where plaintiff settles her suit after it has been filed without payment of the fees due her attorney, the attorney may prosecute the suit to a termination to recover the fees due him under his employment contract.—Franklin v. Ford, Ga., 79 S. E. 366.

3. **Bankruptcy**—Civil Contempt.—A fine imposed on a bankrupt by a state court for a civil contempt for disobedience of an order of that court made in an action against him prohibiting him from transferring his property by disposing of it and shortly after filing the petition in voluntary bankruptcy, is not a provable debt, and a court of bankruptcy is without jurisdiction to interfere with its enforcement.—People v. Sheriff of Kings County, U. S. D. C., 206 Fed. 566.

4.——Landlord's Lien.—The landlord's lien given by Ky. St. § 2317, on the property of the tenant on the leased premises for one year's rent due or to become due under the lease is enforcement against the trustee in bankruptcy of the lessee for the rent due or to become due within a year after the bankruptcy.—In re J. Sapinsky & Sons, U. S. D. C., 206 Fed. 523.

5.——Preference.—If a transfer of property by an insolvent to a creditor necessarily resulted in giving the latter a preference, it will be presumed that such was the intention of the parties.—Lazarus v. Eagen, U. S. D. C., 206 Fed. 518.

6.——Probable Claim.—That a claim is proved and allowed in bankruptcy does not constitute a bar to a creditor's subsequent action for the balance, where the claim is for goods obtained by the debtor by false representations.—J. K. Orr Shoe Co. v. Upshaw & Powledge, Ga., 79 S. E. 362.

7. **Banks and Banking**—Notice.—That the president of a banking company misappropriated funds of a correspondent bank, of which he was cashier, did not charge such banking company with knowledge of the misappropriation so as to preclude recovery of an indebtedness from the correspondent bank, since its president, in misappropriating the funds, acted independently and adversely to its interests.—Corporation Commission v. Bank of Jonesboro, N. C., 79 S. E. 308.

8.——Parties.—In an action by a depositor against a bank to recover the amount of a check, paid by the bank after notice not to do so, the payee of the check is not a necessary party, where plaintiff claimed no relief against him, and the bank denied any notice.—Spruill v. Bank of Plymouth, N. C., 79 S. E. 262.

9.——Special Deposit.—A special deposit in a bank, which subsequently becomes insolvent, may be recovered from the receiver if an equal amount in cash remains continuously in the bank until its suspension and passes to the receiver, although the identical money cannot be traced into the receiver's hands.—Carlson v. Kies, Wash., 134 Pac. 808.

10. **Bastards**—Support.—An agreement by the father of an illegitimate child to pay the mother a certain amount for its support is founded on a good consideration.—Franklin v. Ford, Ga., 79, S. E. 366.

11. **Bills and Notes**—Attorney Fee.—Where space for amount of attorney's fee in printed blank was left blank by drawing the pen across it, held, that the note did not authorize the recovery of an attorney's fee.—Scandinavian-American Bank v. Long, Wash., 134 Pac. 913.

12.——Forgery.—A bona fide purchaser of railroad pay checks, payable to the order of tis employes and delivered by it to imposters, who forged the indorsement of the payee, cannot recover thereon against the company, in the absence of negligence or estoppel.—Simpson v. Denver & R. G. R. Co., Utah, 134 Pac. 883.

13.——Law of Place.—An uncompleted, negotiable instrument sent by a maker residing in Massachusetts to an agent in Canada to be filled out and delivered to the payee there is subject to Canadian laws governing the completion of negotiable instruments.—Perry v. Pye, Mass., 102 N. E. 653.

14. **Brokers**—Marketable Title.—A broker is not entitled to a commission for the sale of land where the purchaser secured by him refuses to complete the purchase because of a defect in the title which did not in fact render the title unmarketable.—Charles Somers Co. v. Pix, Wash., 134 Pac. 932.

15. **Carriers of Live Stock**—28-Hour Law.—Under the 28-Hour Law, § 1, it is the duty of a railroad company, which receives cars of cattle in interstate commerce from a connecting carrier with knowledge that they have already been confined continuously for a longer time time than permitted by the act to at once move them to pens and unload them for rest, feed and water, and any delay, not excused, will subject it to the penalty imposed thereby.—United States v. Delaware, L. & W. R. Co., U. S. D. C., 206 Fed. 513.

16. **Carriers of Passengers**—Ejection.—The fact that a passenger's ticket was mistakenly punched as to its time limit more than once, but none of the extra punch marks indicated a time which had expired, does not relieve the company from liability for the ejection of a passenger.—Forrester v. Southern Pac. Co., Nev., 134 Pac. 753.

17.——Protection from Insult.—A railroad company is responsible for the acts of a conductor who, while collecting tickets and acting within the scope of his authority, addressed insulting remarks to a lady passenger who had failed to purchase a ticket for her child.—Huffman v. Southern Ry. Co., N. C., 79 S. E. 307.

18.——Res Ipsa Loquitur.—An injury to a passenger on a passenger elevator raises a presumption of the negligent failure of the owner of the elevator to exercise the ordinary diligence required of him.—Helmly v. Savannah Office Bldg. Co., Ga., 79 S. E. 364.

19. **Chattel Mortgages**—Bill of Sale.—Where a bill of sale is given to secure a debt, a reconveyance can be compelled upon payment of the debt, but until this is done the instrument remains operative as a bill of sale even though the debt is paid.—Owens v. Bridges, Ga., 79 S. E. 225.

20.——Description.—A description of property in a chattel mortgage is good when it is sufficient to put a person upon inquiry, which, if pursued, will enable him to identify the property covered.—Chattanooga State Bank of Chattanooga v. Citizens' State Bank of Lawton, Okla., 134 Pac. 954.

21. **Commerce**—Incidental Effect.—Where a city ordinance regulating the rates of fare to be charged by a public hackman operated only within the limits of the city and did not assume to regulate the rates for interstate commerce, it was not invalid as regulating interstate commerce because a hackman might contract to carry a passenger into another state.—The Taxicab Cases, 143 N. Y. Supp. 279.

22. **Common Carriers**—Commerce.—An interstate carrier can charge no more and no less than the rate filed with and approved by the Interstate Commerce Commission and published as the lawful rate, and a greater or less charge cannot be justified on the ground of mistake.—Aldrich v. Southern Ry. Co., S. C., 79 S. E. 316.

23. **Contracts**—Building Contract.—A contractor held entitled to sue for contract price, and not relegated to action on quantum meruit, though work was not completed within the contract period, where the owner had extended the time, and the delay was caused by the owner's act.—Lapp-Gifford Co. v. Muscoy Water Co., Cal., 134 Pac. 989.

24.——Public Policy.—A provision in a contract or in a divorce decree binding the husband to support minor children after his death does not contravene public policy.—Stone v. Bayley, Wash., 134 Pac. 820.

25. **Corporations**—Foreign Corporation.—Service on the president of a foreign corporation, temporarily in the state, held not a good service on the corporation in a personal action, where it had no office, place of business, agent, or property in the state, and was not carrying on business in the state.—Ostrander v. Deerfield Lumber Co., U. S. D. C., 206 Fed. 540.

26.——Inspection of Books.—A stockholder may obtain an inspection of corporate books for a just purpose or to prevent injury by mandamus, but, where there was no allegation as to the necessity for an examination of books, the writ was properly denied.—Davidson v. Almeda Consol. Mines Co., Ore., 134 Pac. 782.

27.——Reorganization.—If it comes to the actual notice of the court on the hearing of a motion to confirm a foreclosure sale of the property of a public service corporation that the intending purchasers have conceived a definite program, though a reorganization plan, to use such property when acquired in a way, or to effect a purpose, forbidden by the Constitution or public policy of the state, the court may properly take such fact into consideration.—Investment Registry v. Chicago & M. Electric R. Co., U. S. D. C., 206 Fed. 488.

28. **Courts**—Rule of Property.—Determination of the Supreme Court of Tennessee, that there was no constitutional union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America effected by their respective General Assemblies in May, 1906, held not a rule of property, but the decision of a question of general jurisdiction, and therefore not binding on federal courts sitting in that state.—Sherard v. Walton, U. S. D. C., 206 Fed. 562.

29. **Criminal Law**—Confession.—What witness said was the substance of defendant's confession was not required to be excluded, because he said he could not give every word of it.—State v. Natcisse, La., 63 So. 182.

30.——Immunity. A—justice of the peace, acting as a coroner at an inquest for murder, is without power to grant immunity to any witness for answering incriminating questions.—Faucett v. State, Okla., 134 Pac. 839.

31.——Plea in Abatement.—Where a plea in abatement is filed to an indictment, the commonwealth may demur or reply, but it cannot do both.—Mullins v. Commonwealth, Va., 79 S. E. 324.

32. **Damages**—Ability to Labor.—In estimating damages for personal injuries, the loss of ability to labor may be considered as pain and suffering.—City of Rome v. Ford, Ga., 79 S. E. 243.

33.—Exemplary.—Exemplary damages may be recovered in actions for the tortious breach of a contract.—Forrester v. Southern Pac. Co., Nev., 134 Pac. 753.

34.——Lost Time.—To recover damages for the expenditure of time and money, there must be evidence of the necessity thereof, and of the value of the time, and on proper proof there may be a recovery for injury to business, its reputation and good will; and where it is certain that damages have accrued from defendant's wrongful acts, plaintiff will not be denied the recovery of any damages because of uncertainty as to the amount thereof.—Virtue v. Creamery Package Mfg. Co., Minn., 142 N. W. 930.

35. **Deeds**—Failure of Consideration.—Where a grantee under a conveyance in consideration of the grantor's support failed to support the grantor, and denied that she was under any legal obligation to do so, the consideration failed, and the conveyance would be rescinded

in a court of equity.—Martin v. Hall, Va., 79 S. E. 320.

36.——Fixtures.—Between the vendor and purchaser the common-law rule that whatever is affixed to the freehold becomes a part of it and passes with it is observed in full vigor.—Basnight v. Small, N. C., 79 S. E. 269.

37. **Divorce**—Custody of Children.—While presumptively the mother is entitled to the custody and care of minor children of tender years, the good of the children is the controlling consideration, and courts will look to this rather than to the whims of the parents.—Simmons v. Simmons, Cal., 134 Pac. 791.

38.——Stipulation for Alimony.—Where parties to divorce proceedings contract that a decree may be entered providing for the payment of alimony, or for the support of minor children, to continue after the death of the father, it gives the court power to make such decree, though it would not ordinarily possess such power under the statute.—Stone v. Bayley, Wash., 134 Pac. 820.

39. **Electricity**—Safety Appliances.—The patrons of an electric company have the right to assume that everything that is open to touch concerning the appliances through which the electricity is conveyed can be touched with safety and that the company has done all that human care, vigilance and foresight can reasonably do, consistent with the practical operation of its plant, to render such appliances safe.—White v. Reservation Electric Co., Wash., 134 Pac. 807.

40.——Trespasser.—Where a child went on the tracks of a motor road, along the poles of which was strung an electric light wire, which had become broken, took hold of the wire, and brought it in contact with the rail, causing a flash which set fire to her clothes, held, that the owner of the road and wire was not liable; the child being a trespasser, or at most a bare licensee.—Kiser v. Colonial Coal & Coke Co., Va., 79 S. E. 348.

41. **Eminent Domain**—Abandoning Proceedings.—Proceedings to take property for public use may be abandoned at any time prior to the payment of the award.—Oregon R. & Navigation Co. v. Taffe, Ore., 134 Pac. 1024.

42.——Adaptability.—Where land condemned for reservoir purposes in connection with the New York City water supply was particularly available and adaptable therefor, and had so been considered for years, it was not error to make a separate award, in addition to the value of the land for its availability and adaptability.—In re Bensel, C. C. A., 206 Fed. 369.

43.——Adjoining Land.—The damage to adjoining lots, occasioned by the change in a street grade, is damage for which just compensation is required to be made.—Provident Trust Co. v. City of Spokane, Wash., 134 Pac. 927.

44. **Equity**—Bill of Review.—The holder of a vendor's lien, who, in a suit to enforce a mechanic's lien, failed to object to the commissioner's report finding that the mechanic's lien was a first lien on a building, or to the decree of sale or decree confirming the sale held not entitled to a redistribution of the proceeds of sale on a bill of review.—Phipps v. Wise Hotel Co., Va., 79 S. E. 349.

45.——Laches.—The law will not aid an heir to recover property which by the thrift of others has been made valuable, where he has slept upon his rights for years, after being notified of all the facts.—Anderson Co. v. Regenold, Cal., 134 Pac. 999.

46. **Evidence**—Res Ipsa Loquitur.—In an employe's action for injuries, the burden is on plaintiff to prove defendants' negligence; such negligence not being presumed from the mere fact of the accident.—Chicago, R. I. & P. R. Co. v. Duran, Okla., 134 Pac. 876.

47. **Executors and Administrators**—Action for Death.—A right of action by a non-resident for damages for wrongful expulsion from a train is sufficient property to warrant the appointment of an administratrix of his estate in the county in which the action was pending.—Forrester v. Southern Pac. Co., Nev., 134 Pac. 753.

48. **Extradition**—Describing Offense.—Where a complaint on which extradition proceedings are based intelligibly describes and identifies the offense, which is punishable by the laws of both countries and is included in the extradition treaty, it is not material that it is not described by the same name in the laws of both countries or at common law.—Powell v. United States, C. C. A., 206 Fed. 400.

49. **Fixtures**—Abandonment.—Where a lease for 10 years of a lot expressly provided that a house erected on it should, at the expiration of the lease, belong to the tenants, a holding over by the tenants after the expiration of the lease under a tenancy at will did not constitute a surrender or abandonment of the building.—Miller v. Johnson, Utah, 134 Pac. 1017.

50. **Fraudulent Conveyances**—Heirs of Grantor.—The heirs of a grantor cannot sue to set aside a deed executed by him with intent to defraud his creditors, and as to them the grantee acquired a good title.—Pierce v. Stallings, N. C., 79 S. E. 302.

51. **Habeas Corpus**—Custody of Child.—The evidence in habeas corpus proceedings by a mother to obtain the custody of her child held sufficient to support the finding that the mother had abandoned the custody of the child to others without intention of reclaiming it, and that it was to the best interests of the child to remain with its foster parents.—Hummel v. Parrish, Utah, 134 Pac. 898.

52. **Homicide**—Self-Defense.—In a prosecution for homicide, where the defendant claimed self-defense, evidence held sufficient to warrant the jury in finding that the defendant had no reasonable grounds to apprehend injury from deceased, and therefore to sustain a conviction of manslaughter.—People v. Zachary, Cal., 134 Pac. 1005.

53. **Husband and Wife**—Loss of Consortium.—Where a woman has recovered full compensation from a carrier for all injuries sustained by her as a result of a wreck of the train on which she was a passenger, her husband is not entitled to recover for loss of consortium.—Whitcomb v. New York, N. H. & H. R. Co., Mass., 102 N. E. 663.

54.——Non-Support.—That a wife, after separation because of her husband's fault, took service and supported herself was no defense to a prosecution for nonsupport.—Draper v. Commonwealth, Va., 79 S. E. 322.

55.——Separate Property.—That a yacht which was the separate property of the wife was registered in the husband's name and kept in his possession did not alter its status as the wife's separate property; the presumption being that the husband held it in trust for her.—Dyment v. Nelson, Cal., 134 Pac. 988.

56. **Indemnity**—Consideration.—Where, under an agreement to indemnify a surety company against loss under a surety bond, an indemnity bond was given which was not satisfactory and a new bond executed, the new bond was not void for want of consideration.—Title Guaranty & Surety Co. of Scranton, Pa., v. Packard-Spink Co., Wash., 134 Pac. 812.

57. **Indictment and Information**—Counts.—Larceny and burglary of a car are generic, and so may be charged in the same indictment, provided it be in different counts.—State v. Natcisse, La., 63 So. 182.

58.——Counts.—Where there are several ways in which under the statute an offense may be committed, and they are embraced in the same general definition and are punishable in the same manner and to the same extent, they are not distinct offenses and may be charged conjunctively in the same count of an indictment.—Stevens v. State, Tex., 159 S. W. 505.

59.——Plea in Abatement.—That another indictment is pending against defendant, charging him with the same offense, is not ground for a plea in abatement.—Brown v. State, Ga., 79 S. E. 231.

60. **Injunction**—Preliminary.—A preliminary injunction should not anticipate the ultimate determination of the question involved, but should merely recognize that a sufficient case has or has not been made to warrant the preservation of property rights in statu quo.—American Life & Accident Ins. Co. v. Ferguson, Ore., 134 Pac. 1029.

61.——Remedy at Law.—Equity will enjoin an action at law by an infant, seeking to rescind a contract and recover back money paid for the purchase of stock of a corporation, where a full and complete investigation of the rights of the parties could not be had in the action at law.—Lown v. Spoon, 143 N. Y. Supp. 275.

62.——Unfair Competition.—The use by an employe of confidential information obtained from his employer in establishing a competing business held to constitute unfair competition, which entitled the employer to an injunction.—Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co., U. S. D. C., 206 Fed. 545.

63. **Judgment**—Disqualified Judge.—A court of equity, in an action wherein the right to recover was based on the judgment in a former action, would disregard the determination of the Appellate Division in such former action, where it appeared that a disqualified judge sat as a member of that court.—Seaward v. Tasker, 143 N. Y. Supp. 257.

64.——Modification.—The trial court has no jurisdiction to modify or correct a final order or decree after the expiration of the term at which it was rendered unless steps to secure such action have been taken during the term.—Philip Carey Co. v. Vickers, Okla., 134 Pac. 851.

65.——Revival.—Statutory proceedings to revive a judgment which has become dormant constitute in substance a new action, and the judgment rendered therein is a new judgment, from the date of which only limitation begins to run against an action thereon in another jurisdiction.—Tod v. Kuykendall, U. S. D. C., 206 Fed. 482.

66. **Landlord and Tenant**—Hidden Defects.—While a landlord does not impliedly warrant that premises are safe or fit for purpose for which they are rented, if he fails to disclose defects, dangerous to the life, health, or property of the tenant, known to him but not known to the tenant or discoverable by reasonable examination, he is liable for injuries caused by his negligence.—Howard v. Washington Water Power Co., Wash., 134 Pac. 927.

67.——Repairs.—In the absence of any agreement to do so, a landlord need not repair patent defects of which the tenant knew when he rented the building.—Moore v. Rosser, Ga., 79 S. E. 246.

68.——Waiver.—A landlord who by his lease reserved a lien for the rent on all property on the leased premises did not waive such lien by thereafter taking a chattel mortgage on such property subsequent to a lien in favor of a third person.—Thomas v. Grote-Rankin Co., Wash., 134 Pac. 919.

69. **Libel and Slander**—Privileged Matter.—The publication in a newspaper of a fair and correct report of an investigation and report by a grand jury is privileged in the absence of express malice; such investigation and report constituting a judicial proceeding.—Sweet v. Post Pub. Co., Mass., 102 N. E. 660.

70. **Limitation of Actions**—Interrupting Running.—Where a cause of action does not accrue until after the death of the party who would have been entitled to sue, the running of the statute of limitations is not interrupted because there happens to be no administrator entitled to sue, since the persons beneficially interested have the full period of limitation in which to obtain administration and bring action.—Cortelyou v. Imperial Land Co., Cal., 134 Pac. 981.

71.——Question of Law.—Since it was a question for the court as to whether defendant, in an action against her upon a note, had withdrawn a plea of the statute of limitations, a finding by the jury thereon will be disregarded.—Moore v. Stuart, Mass., 102 N. E. 658.

72.——Self-Serving Declaratory.—Where the defendants contend that a note on which the plaintiff relies was a "recent contrivance" to avoid the statute of limitations, a letter to the original payee from his son, which referred to the note, is competent on that issue even though it amounts to self-serving declarations.—Perry v. Pye, Mass., 102 N. E. 653.

73. **Malicious Prosecution.**—Termination of Prosecution.—Before an action for malicious prosecution can be instituted, it is necessary that the proceedings on which it is based shall have terminated.—Brinkley v. Knight, N. C., 79 S. E. 260.

74. **Master and Servant**—Assumption of Risk.—An employe in resuming operation of a machine after the master's engineer had repaired it, and he had been assured that it had been put in good order, does not assume the risk, unless knowing the repairs had not remedied the defect.—Moseley v. Los Angeles Packing Co., Cal., 134 Pac. 994.

75.——Disregarding Regulations.—Where employes with the knowledge of the master habitually disregard a notice reading: "Dangerous, persons riding this elevator do so at their own risk"—posted on a freight elevator, this may amount to an abandonment of such prohibitory rule.—Selden-Breck Const. Co. v. Linnett, Okla., 134 Pac. 956.

76.——Employment.—Where plaintiff, after being employed by defendant to do certain drilling, brought suit against defendant, asserting an interest adverse to him in the property drilled, and also became general manager of a company interested adversely to defendant as to the drilling, he thereby terminated his right to continue in defendant's employ.—Weber v. Barnsdall, Okla., 134 Pac. 842.

77.——Inspection.—A master is not only bound to exercise reasonable care to provide safe, suitable, and sufficient machinery, means, and appliances, but is also to use reasonable care to inspect them and discover and remedy defects.—Foster v. Bucknall S. S. Lines, C. C. A., 206 Fed. 415.

78. **Navigable Waters**—Riparian Owner.—The water frontage belonging to the land of a riparian owner on a navigable stream or tidewater, over which he has the right of access and to wharff out to navigable water, is measured by lines extending at right angles from the shore line at the points where it is intersected by his upland boundaries.—Oregon Coal & Navigation Co. v. Anderson, C. C. A., 206 Fed. 404.

79. **Negligence**—Actionable Negligence.—To constitute "actionable negligence," where the wrong is not willful and intentional, the elements essential are the existence of a duty to protect plaintiff from injury, failure of defendant to perform that duty, and consequential injury to plaintiff.—Chicago R. I. & P. R. Co. v. Duran, Okla., 134 Pac. 876.

80.——Contributory Negligence.—Where an occupant of premises adjoining a lot upon which an excavation has recently been made is injured from falling into the excavation while following a path near its edge, which path gives way for want of lateral support, and it appears that she had been accustomed to use this path for several months, she is not guilty of contributory negligence, as a matter of law.—Connally v. Woods, Okla., 134 Pac. 869.

81.——Drunkenness.—Voluntary drunkenness is no excuse for negligence, either primary or contributory; but drunkenness is not in itself negligence but is merely an evidentiary fact tending to prove negligence.—Herrick v. Washington Water Power Co., Wash., 134 Pac. 934.

82.——Slight.—Slight negligence on the part of the plaintiff does not contribute or enter as one of the concurrent proximate causes of an injury resulting from palpable and continuous negligence on the part of a defendant, since to so hold would be to impose the rule of extraordinary care.—Mosso v. E. H. Stanton Co., Wash., 134 Pac. 941.

83.——Trespasser.—An owner of premises owes to a trespasser the duty only of doing him no intentional or willful injury, and before any duty of protection arises there must be such notice of his danger as would put a prudent man on the alert.—Kiser v. Colonial Coal & Coke Co., Va., 79 S. E. 348.

84. **Partnership**—Estoppel.—Whatever one of two partners said or wrote to a third person in

regard to the firm transactions bound the other partner, and notice to him and waiver of tender by him likewise bound the other partner.—Curtis v. Saxton, Mo., 159 S. W. 512.

85. **Payment**—Right to Recover.—Where money due a bank was by mistake paid to another, and the circumstances were such that the company receiving could not in equity and good conscience retain it, and that it lost nothing by the payment, and would be in no worse position after the mistakes were corrected than before, the parties paying the money were entitled to recover it.—Pine Belt Lumber Co. v. Morrison & Harvey, Ga., 79 S. E. 363.

86. **Principal and Agent**—Punitive Damages.—A principal is liable for exemplary damages for the wrongful, wanton, and oppressive acts of his agents when acting within the scope of their employment, although the particular acts were not authorized or ratified.—Forrester v. Southern Pac. Co., Nev., 134 Pac. 753.

87. **Principal and Surety**—Novation.—Where a new note is accepted by the payee or indorsee of a note in renewal of a note previously given, without the consent of a surety thereon, this amounts to a novation and discharges the surety.—Matthews & Son v. Richards, Ga., 79 S. E. 227.

88. **Quieting Title**—Remedy at Law.—Ordinarily an action to quiet title to personal property will not lie and will only lie in those cases where, because of some exceptional circumstances or condition, his remedy at law is inadequate.—Central Savings Bank & Trust Co. v. Amalgamated Society of Carpenters and Joiners, Colo., 134 Pac. 1007.

89. **Railroads**—Assumption of Risk.—No cause of action arises from an injury caused by the doing of a dangerous but lawful act in a lawful manner; but in such cases the doctrine of assumption of risk applies.—Steele's Adm'r v. Colonial Coal & Coke Co., Va., 79 S. E. 346.

90.——Crossing.—Where plaintiff's view of a crossing was obstructed, he was not bound to stop and look, but was required to take such other precautions as reasonable prudence demanded.—Eaton v. Southern Pac. Co., Cal., 134 Pac. 801.

91.——Reasonable Care.—While a railroad company is entitled to a clear track and is not ordinarily liable for injuries to persons thereon, yet if it knows that persons are in the habit of using its track for a footpath it is bound to exercise reasonable care to prevent injury to such persons.—Nesbit v. Webb, Va., 79 S. E. 330.

92.——Receivership.—Purchasers of a railroad from receivers are liable on equitable principles for injuries caused by the negligence of the receivers while operating the road.—Lassiter v. Norfolk Southern R. Co., N. C., 79 S. E. 264.

93. **Removal of Causes**—Fraudulent Joinder.—The right of a citizen of another state, when sued in a state court, to have the controversy tried and determined in a federal court, is constitutional, and cannot be defeated by fraudulent joinder as a codefendant of a citizen of the state in which the suit is brought.—Price v. Southern Power Co., U. S. D. C., 206 Fed. 496.

94.——Practice.—A removing defendant may challenge the validity of the service in the federal court after removal, provided he has not entered a general appearance.—Ostrander v. Deerfield Lumber Co., U. S. D. C., 206 Fed. 540.

95. **Sales**—Implied Warranty.—There is an implied warranty in a sale of nursery trees that the trees are reasonably fit for the purpose for which they are purchased; that they are true to name and will germinate and grow.—Kelly v. Lum, Wash., 134 Pac. 819.

96. **Set-Off and Counterclaim**—Equity.—The power to compel a set-off was never recognized at common law but has always been exercised by equity whenever necessary for the proper administration of justice.—Perry v. Pye, Mass., 102 N. E. 653.

97.——Partnership.—In an action by a partnership for the price of partnership property sold by one partner, defendant could not plead as a defense a set-off based on a contract made with one partner solely in his individual capacity.—F. T. Hardy & Co. v. Jones Bros., Ga., 79 S. E. 246.

98. **Specific Performance**—Extent of.—Specific performance of a contract should be enforced on the contract as an entirety, if possible; but, if not possible, specific performance of a part should not leave anything that depends upon that which is specifically enforced, or vice versa.—Riverside Land & Irrigation Co. v. Sawyer, Colo., 134 Pac. 1011.

99.——Marriage.—A stipulation in an agreement to convey land in consideration of marriage that plaintiff should be good and kind to defendant's daughter, held not to render the agreement indefinite, uncertain, or unenforceable.—Winslow v. White, N. C., 79 S. E. 258.

100. **Sunday**—Illegal Contract.—Where defendant hired an automobile on Sunday for use on that day and the contract was void under Pen. Code 1910, § 416, and where he used the car as intended, his subsequent promise, made on a secular day without a new consideration, to pay for the hire did not render the contract enforceable.—Jones v. Belle Isle, Ga., 79 S. E. 357.

101. **Tenancy in Common**—Ouster.—Where a stranger to the title takes a conveyance of the whole estate in a tract from a tenant in common, and enters into exclusive possession, claiming title to the whole, such conveyance and possession is an ouster, on which the grantee may base a claim of adverse possession.—Virginia Coal & Iron Co. v. Hylton, Va., 79 S. E. 337.

102. **Trade Marks and Trade Names**—Protection.—The protection accorded to a trade-mark is not limited to such imitations as would deceive a cautious and discriminating customer, but include as well such as would be likely to deceive the ordinary or unwary purchaser.—De Voe Snuff Co. v. Wolff, C. C. A., 206 Fed. 420.

103. **Trover and Conversion**—Right of Possession.—There can be no conversion of a chattel so long as the party in possession has a right to retain it against the person claiming the right to recover it.—Jeems v. Lewis, Ga., 79 S. E. 235.

104.——Security for Debt.—A person who holds property as security for a debt may maintain trover for its recovery from one who wrongfully withholds possession thereof.—Gearreld v. Woodruff, Ga., 79 S. E. 355.

105. **Venue**—Bankruptcy.—Where the court has jurisdiction of the person of one defendant when a suit is filed, the mere fact that such defendant is discharged in bankruptcy will not prevent the court from proceeding to judgment against another defendant, jurisdiction over whom is dependent, not upon the liability of the bankrupt, but upon jurisdiction over him.—Daniel v. Browder-Magnet Co., Ga., 79 S. E. 237.

106. **Vendor and Purchaser**—Fraud of Agent.—Where the owner of real estate conveyed it to his agent to sell, who contracted to convey it to an innocent purchaser for value, the purchaser is not to be deprived of an honest bargain because the agent defrauded the real owner, and the purchaser, upon compliance with the contract of purchase, may bring action to compel a conveyance from the real owner, to whom it had been reconveyed.—Shirey v. All Night and Day Bank, Cal., 134 Pac. 1001.

107. **Waters and Water Courses**—Percolations.—Where water percolated onto defendant's land, making it swampy, held, that he could drain it by sinking wells and could use the water so collected to irrigate his own land, although it was thereby prevented from reaching a river into which it formerly percolated.—Roberts v. Gribble, Utah, 134 Pac. 1014.

108. **Wills**—Attestation.—A testator need not expressly ask the witnesses to sign their names as witnesses thereto, if the will is executed under such circumstances as to indicate that he intended the paper writing that he signed to take effect as his will.—In re Cherry's Will, N. C., 79 S. E. 288.

109.——Interest in Partnership.—A partner cannot bequeath or devise his undivided interest in any specific article belonging to the firm, since each has a joint interest in the whole but not a separate interest in any particular part of the partnership property.—Spencer v. Spencer, N. C., 79 S. E. 291.